IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 33834

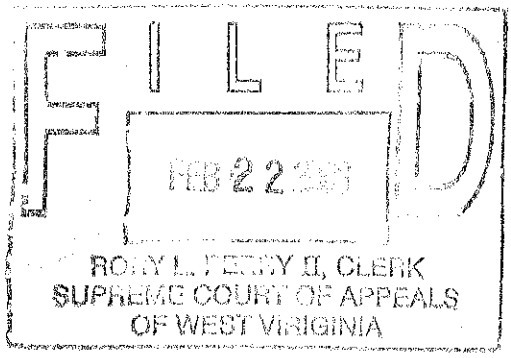
PAUL E. FORSHEY and
MELISSA L. FORSHEY,

Appellants/Plaintiffs below,

v.

THEODORE A. JACKSON, M.D.,

Appellee/Defendant below.



BRIEF OF THE APPELLANTS

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
THE HONORABLE JENNIFER BAILEY WALKER, PRESIDING
Civil Action No. 06-C-1534

PAUL E. FORSHEY and
MELISSA L. FORSHEY,
Appellants/Plaintiffs,
By Counsel

Anne E. Shaffer, Bar No. 5174
UNDERWOOD & PROCTOR LAW OFFICES
923 Third Avenue
Huntington, West Virginia 25701
(304) 552-0508
Counsel for Appellant/Plaintiffs below

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I. Kind of Proceeding and Nature of Ruling Below

This is an action filed on behalf of the Appellants/Plaintiffs (hereinafter referred to as "Appellants"), pursuant to the West Virginia Medical Professional Liability Act, W. Va. Code §§ 55-7B-1 *et seq.* (hereinafter "MPLA") for medical negligence against a physician, Appellee/Defendant below (hereinafter "Appellee physician"). By order entered on the 5th day of April, 2007, the Circuit Court of Kanawha County, Judge Walker presiding, dismissed the Appellants'/Plaintiffs' (hereinafter referred to as "Appellants") Complaint as outside of the statute of repose as found in the MPLA, W. Va. Code § 55-7B-4. Specifically, the Circuit Court made erroneous findings of fact and incorrectly concluded, *inter alia*, that because the surgery, itself, fell outside of the ten year statute of repose, the *Complaint* must be dismissed even though (1) the Appellant, Paul Forshey, continued to treat with the Appellee physician for the same condition for almost two more years, most of which time did not fall outside the ten year statute of repose; and (2) Appellant's expert opined that each time thereafter that the Appellee physician examined the Appellant and failed to x-ray his hand constituted a new and separate breach of the standard of care, most of which examinations clearly fell within the ten year period.

This Court granted the Appellants' *Petition for Appeal* and, consistent with an order of this Court, the Appellants herein file their *Brief of the Appellant.*

II. Statement of the Case

On or about August 3, 2006, after complying with the notice requirements of the MPLA, W. Va. Code § 55-7B-6, the Plaintiffs filed this medical negligence action against the Defendant below, Theodore Jackson, M.D., for medical malpractice arising from

treatment that the Plaintiff below, Paul E. Forshey, received for his carpal tunnel syndrome from on or about November 19, 1994, until January 31, 1997. *See Complaint*, ¶¶ 4, 5.

On September 18, 2006, the Appellee physician filed a Motion to Dismiss, alleging that the entire action was barred by the statute of repose contained in the MPLA at W. Va. Code § 55-7B-4. In response to the *Motion to Dismiss*, the Appellants submitted the notice to the Defendant and a certificate of merit signed by Edward W. Eskew, D.O., which were already part of the Circuit Court file as attachments to the Complaint. In the *Certificate of Merit* accompanying the Complaint, Dr. Eskew opined that the Appellee physician operated on the Appellant on July 6, 1995, during which operation, the Appellee physician left a foreign body, specifically, a scalpel blade, in the hand of the Appellant. Further, Dr. Eskew opined that "[a]t each follow up visit, in 1996 and 1997, Mr. Forshey c/o [complained of] painful swelling & a knot over the thenar eminence (palmar aspect) of the left thumb near the surgical site. Any 1° care or ER specialist (let alone a hand specialist) would have included a foreign body reaction in the differential diagnosis, thus a need for an x-ray at that point in time." *See Certificate of Merit*, dated April 6, 2006, attached to the *Complaint*.

In an expert opinion letter attached to the *Complaint*, Dr. Eskew expounded, making it perfectly clear that: "[d]uring every post operative visit in 1995 through 1997, Mr. Forshey complained of painful swelling and a 'knot over the palmar aspect of the left thumb,' [quoting from the medical records]. * * * I do not know why Dr. Jackson did not include a foreign body reaction in his differential diagnosis. Any 4th Year medical student would include foreign body reaction in the differential diagnosis. To eliminate a

foreign body reaction, an x-ray would have been part of the evaluation. Not doing so is deviating from the standard of care applicable to any physician performing these surgeries and follow-up care." *See Letter* dated April 5, 2006, attached to *Complaint.*

A hearing was held on the *Motion to Dismiss* in the Circuit Court of Kanawha County, West Virginia, before the Honorable Jennifer Bailey Walker on November 17, 2006. *See Transcript of November 17, 2006, Hearing.* By order entered April 3, 2007, Judge Walker granted the Motion to Dismiss by entry of the order proposed by Appellee, rendering the following completely inappropriate findings of fact:

> 2. The Plaintiff alleges [in the Complaint] that in 1996 or 1997, he complained of a painful swelling and a knot over the palmar aspect of the left thumb.
> 3. On January 8, 1997, the Plaintiff presented for an office visit at Dr. Jackson's request for said complaints, and an exploratory surgical procedure was scheduled for February 3, 1997.
> 4. On January 31, 1997, Dr. Jackson's office contacted the Plaintiff in order to re-schedule said surgery due to a scheduling conflict. The surgery was then scheduled for February 17, 1997.
> 5. On February 13, 1997, the Plaintiff called to cancel the surgery and indicated that he would call back to re-schedule the same. However, the Plaintiff never did so.
> 6. The Plaintiff alleges that he learned in July, 2005, showing an x-ray of his left hand, that a foreign body was in Plaintiff's left hand.
> 7. Dr. Edward W. Eskew, Plaintiff's expert, has authored a Certificate of Merit, wherein he opined that the foreign body was left in the palmar aspect of the Plaintiff's left thumb during the course of the surgical procedure performed in 1995.
> 8. It was not until on or about August 3, 2006, the Plaintiff filed the present action pursuant to the provisions of the W.Va. Medical Professional Liability Act §55-7b-1m et seq.

Findings of Fact, Conclusions of Law and Judgment Order at 1-2 (emphasis supplied).

It was based upon these findings that the Court concluded that:

> 11. In the instant case, the Plaintiff has failed to demonstrate that the Defendant misrepresented material facts or otherwise acted to

prevent the Plaintiff from discovering the nature of his injuries. By Plaintiff's own admission in their Notice of Claim, Plaintiff acknowledges that he complained of painful swelling and a knot over the palmar aspect of his left thumb in 1996 and 1997. Furthermore, Dr. Jackson scheduled an exploratory surgery for February 3, 1997 and the same was later rescheduled for February 17, 1997, due to a scheduling conflict. The Plaintiff subsequently cancelled this surgery. Therefore, the Plaintiff cannot claim that the Defendant acted in a manner to prevent the Plaintiff from discovering the nature of his injuries. It was at this time, in 1996 or 1997 when the Plaintiff acknowledged that he complained of painful swelling and a knot over the palmar aspect of his thumb, that he, with the exercise of reasonable diligence, should have discovered the injury, and the Plaintiff's Complaint should have been filed within two years of this date due to the application of the discovery rule. However, viewing in a light most favorable to the Plaintiff, pursuant to West Virginia's statute of limitations discussed above, the absolute latest that this action could have been filed would have been on July 6, 2005, which is ten years after the date of the original surgery and alleged injury.

12. The West Virginia Medical Professional Liability Act §55-7B-4(b) provides "That in no event shall any such action be commenced more than ten years after the date of injury." (Emphasis added).

Id. at 2-3.

III. Statement of Facts

According to the medical records of the Appellee physician, the Appellant, Paul E. Forshey, first presented to the Appellee physician on November 15, 1994, complaining of carpal tunnel syndrome (CTS in the notes) in both wrists, but worse in left wrist. See *Medical Records*, attached to *Plaintiff's Memorandum in Opposition to Motion to Dismiss* as Exhibit 1 at 2. The Appellee physician recommended surgery but prescribed a splint. The Appellant was next seen by Appellee physician on July 6, 1995, when he, again, presented with CTS in both wrists. Again, the Appellee physician recommended surgery, and surgery was, indeed, performed on July 6, 1995. *Id.* at 7. During the surgery, a v-blade, specially made for Appellee physician, was left in the Appellant's left hand.

On October 22 and October 25, 1996, the Appellant returned to Appellee physician complaining of pain in the palm of his left hand, trouble using tools, tenderness, nodular swelling, and sharply positive Tinel sign over forearm. *Id.* at 3-4. He was injected with Kenalog; however, no x-rays were taken. On January 6, 1997, the Appellant presented, again, complaining of a knot in his left hand which was painful. At that time, Appellee physician prescribed Advil and Dilantin, however, when the Appellant presented with pain again on January 8, 1997, the Appellee physician recommended excision of the left palm. *Id.* at 4-5. Even though the Appellee physician desired to open up the Appellant's hand, at no time was an x-ray taken. Unfortunately for the Appellant and, perhaps, Appellee physician, the Appellant had no insurance and could not afford to pay for the recommended surgery and, therefore, no surgery was performed. Because the Appellant believed there was nothing left to be done to treat his pain and swelling other than additional surgery, which he couldn't afford, the Appellant stopped receiving any treatment for his left hand on January 8, 1997. It is undisputed that this date constitutes that last treatment by the Appellee physician of the Appellant for carpal tunnel syndrome and surgery of Appellant's left hand.

For eight more years, the Appellant suffered pain and disability in his left hand; however, on July 22, 2005, the Appellant presented at the Arrowhead Regional Medical Center in Colton, California, with an unrelated injury to his left index finger. See *Medical Records* attached to *Petition for Appeal* at 1. At that time, the Appellant's left hand was x-rayed for the first time since the surgery on July 6, 1005. *Id.* at 7. According to the x-ray report:

A 3.4 CM X 5 MM METALLIC FOREIGN BODY IS SEEN IN THE PALMAR ASPECT OF THE LEFT HAND.

Id.

It is undisputed at this point that the 3.4 centimeter blade found in Appellant's hand is the scalpel blade used by the Appellee physician during the July 6, 1995 surgery.

In summary, the Appellant was continually treated by the Appellee physician for the same medical condition, that is, carpal tunnel syndrome in his left hand, from November 15, 1994 until January 8, 1997. The surgery during which the foreign body was left was performed on July 6, 1995. However, the Appellant was seen again on at least four (4) separate occasions for the same medical condition from October 22, 1996, until January 8, 1997, and at no time from October 22, 1996 until January 8, 1997, was the Appellant's hand x-rayed or an x-ray ordered or mentioned in the medical records. The blade was discovered in the Appellant's hand on July 22, 2005, when the hand was x-rayed for another, unrelated injury. Less than two years after discovery of the blade suit was filed. The date of the filing of such *Complaint* was August 3, 2006, over ten years after the surgery, but less than ten years from the date of the four follow up examinations by the Appellee physician. As a result of the medical negligence of the Appellee physician and his continued failure to diagnose the Appellant's condition, the Appellant is permanently disabled in his left hand with loss of feeling, numbness, and loss of strength and grip.

IV. Assignments of Error

A. *The Circuit Court Erred by Finding that the Cause of Action Sued Upon Accrued No Later the Date of the Surgery and, Accordingly, the Ten Year Statute of Repose Barred the Action*

B. *The Circuit Court Erred by Finding that the Plaintiff Could Not Prove Additional, Independent Instances of Breach of the Standard of Care Which Constitute Separate Causes of Action for Medical Negligence Associated with the Four Follow-up Examinations, Which Causes of Action, if Proven, Would Not Be Barred by the Ten Year Statute of Repose*

V. Argument

A. *The Continuous Medical Treatment Doctrine Applies to this Action and, Accordingly, the Statute of Repose Did Not Begin to Run Until the Date of the Last Treatment by the Appellee Physician of the Appellant's Left Hand*

The "continuous medical treatment" doctrine works to toll the accrual of a cause of action for medical negligence during a course of treatment, which includes the wrongful acts or omissions, where the treatment has run continuously and is related to the original condition or complaint. *See* 61 Am. Jur.2d. *Physicians, Surgeons, Etc.*, §299. The logic underlying the doctrine serves not only the patient, but the physician as well. As explained by the Supreme Court of Arkansas:

> Certainly it would not be equitable to bar a plaintiff, who for example, has been subjected to a series of radiation treatments in which the radiologist negligently and repeatedly administered an overdose, simply because the plaintiff is unable to identify the one treatment that produced his injury. Indeed, in such a situation no single treatment did cause the harm; rather it was the result of several treatments, a cumulative effect. From the point of view of the physicians, it would seem reasonable that if he had made a mistake, a misdiagnosis for example, he is entitled to the opportunity to correct the error before harm ensues. And, as one court has put it, "It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician."

Lane v. Lane, 295 Ark. 671, 675, 752 S.W.2d 25, 27 (1988), *quoting* D. Louisell & H. Williams Wachsman, *Medical Malpractice*, § 13.08.

The Arkansas high court, while noting then in 1988 the growing number of jurisdictions which had adopted the doctrine, defined it thus:

> [T]he cause of action would accrue at the end of a continuous course of medical treatment for the same or related condition even if the negligent act or omission has long since ended.

Id., *quoting* Pegalis and Wachsman, *American Law of Medical Malpractice*, § 6:7 (1981) and noting adoption of the doctrine by Wyoming, Illinois, Texas, Michigan, Wisconsin, Louisiana, Virginia, Washington, Tennessee, Maryland, New York, California, Missouri, Oregon, Nebraska, and Minnesota.[1]

Since the time of the *Lane* opinion in Arkansas, more states have joined the ranks of states adopting the continuous medical treatment doctrine, rendering that view a clear majority view. *See, e.g., Comstock v. Collier*, 737 P.2d 845 (Colo. 1987); *Babcock v. Lafayette Home Hosp., Woman's Clinic*, 587 N.E.2d 1320 (Ind. Ct. App. 1992); *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996); *Anderson v. Short*, 476 S.E.2d 475 (S.C. 1996); *Anderson v. George*, 717 A.2d 876 (D.C.1998); *Collins v. Wilson*, 984 P.2d 960 (Utah 1999); *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000); *Ratcliff v. Graether*, 697 N.W.2d 119 (Iowa 2005); *and Carpenter v. Rohrer*, 714 N.W.2d 804 (N.D. 2006). *See, also,* the earlier decisions of *Tucker v.*

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[1] The *Lane* Court cited the opinions of *Metzger v. Kalke*, 709 P.2d 414 (Wyo.1985); *Skoglund v. Blankenship*, 134 Ill.App.3d 628, 481 N.E.2d 47 (1985); *Vinklarek v. Cane*, 691 S.W.2d 108 (Tex.Civ.App.1985); *Sheldon v. Sisters of Mercy Health Corp.*, 102 Mich. App. 91, 300 N.W.2d 746 (1980); *Tamminen v. Aetna Casualty & Surety Co.*, 109 Wis.2d 536, 327 N.W.2d 55 (1982); *Lynch v. Foster*, 376 So.2d 342 (La.App.1979); *Farley v. Goode*, 219 Va. 969, 252 S.E.2d 594 (1979); *Samuelson v. Freeman*, 75 Wash.2d 904, 454 P.2d 406 (1969); *Frazor v. Osborne*, 57 Tenn. App. 10, 414 S.W.2d 118 (1966); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966); *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962); *Hundley v. St. Francis Hospital*, 161 Cal. App.2d 800, 327 P.2d 131 (1958); *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943); *Hotelling v. Walther*, 169 Or. 559, 130 P.2d 944 (1942); *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941); *Schmit v. Esser*, 183 Minn. 354, 236 N.W. 622 (1931). *Lane v. Lane*, 295 Ark. 671, 675-676, 752 S.W.2d 25,27-28 (Ark. 1988)

Gillette, 12 Ohio C.D. 401 (Ohio. Cir.1901); *Lopez v. Swyer*, 279 A.2d 116 (N.J. 1971); and *Ballenger v. Crowell*, 38 N.C.App. 50, 247, S.E.2d 287 (1978). *See*, further, *Haggart v. Cho*, 703 A.2d 522 (Pa.Super. 1997)(Courts do not apply per se "continuous treatment rule" to toll statute of limitations in medical malpractice case until end of treatment by defendant, but rather, simply apply discovery rule to determine date when patient could reasonably be expected to know of his injury).

This Court has not addressed, in a medical negligence context, the continuous treatment doctrine, but has adopted the "continuous representation" doctrine in legal malpractice actions stating that "the statute of limitations in an attorney malpractice action is tolled until the professional relationship terminates with respect to the matter underlying the malpractice action." *Smith v. Stacy*, syl. pt. 6,198 W. Va. 498, 482 S.E.2d 115 (1996). In *Smith*, the Court adopted such doctrine and applied it to legal malpractice actions while noting, favorably, its application in medical malpractice actions. *Id.* at 503, 120.

While this Court has not yet officially adopted the doctrine, the Federal Courts of our Circuit have adopted the doctrine as it relates to medical malpractice sued for under the Torts Claims Act. *See Otto v. National Institute of Health*, 815 F.2d 985 (4th Cir. 1987); and *Hurt v. U.S.*, 914 F.Supp. 1346 (S.D.W.Va. 1996).

While often couched in terms of a "tolling" doctrine, the continuous medical treatment doctrine does not actually "toll" the statute of limitations; rather, it applies so that the cause of action does not accrue until the date of the last treatment by the physician for the alleged condition. Thus, the continuous medical treatment doctrine is not akin to the "discovery rule," which tolls the statute of limitations but not the statute of

repose,[2] but is a doctrine which defines the time of accrual of the cause of action, itself.

In the instant case, the reasoning of the Arkansas Supreme Court as set out above seems particularly poignant. While it is not difficult to point to a date when the Appellant's troubles began, *i.e.*, on July 6, 1995 when the blade was left in his hand, it will be very difficult, if not impossible to pinpoint the date upon which the Appellant suffered a physical "injury" because of the blade. For example, it could well be that had the Appellee physician taken an x-ray of Appellant's hand and discovered his mistake on October 22, 1996, Appellant would have suffered no permanent injury and, assuming the Appellee did not charge for removal of the blade, the Appellant would have little real damages to complain about and would certainly not be in a position to bring an expensive medical malpractice action. Thus, Appellant is in the position of the hypothetical patient of which the *Lane* Court spoke, a patient who cannot pinpoint the exact date of injury and, in all likelihood, has suffered a "cumulative" injury. Here, the Appellant was injured not so much by the leaving of the blade in the hand in July of 1995 as he was by the failure to discover the blade over the course of treatment by and visits to the Appellee physician in 1996 and early 1997.

Following this type of logical reasoning, courts have found that, in the case of the leaving of a foreign object in the body by a physician who continues to treat the patient and fails to discover the presence of the object, the cause of action for medical negligence does not accrue until the time of the termination of the physician-patient relationship. *Summers v. Wallace Hospital*, 276 F.2d 831 (9th Cir. 1960)(applying Idaho law); *Thatcher v. DeTar*, 351 Mo. 603, 173 S.W.2d 760 (1943); and *Frazor v. Osborne*, 57 Tenn. App. 10, 414 S.W.2s 118 (1966).

[2] *Gaither v. City Hospital, Inc.*, 199, W. Va. 706, 487 S.E.2d 901 (1997).

In most of the cases cited above, however, it was the statute of limitations and not the statute of repose against which the continuous medical treatment doctrine was being applied. However, of the courts which have examined the interplay between the doctrine of continuous treatment and statutes of repose, many courts have come to the logical conclusion that starting time for the running of the statute of repose is the date of the last continuous medical treatment. *See, e.g., Follis v. Watkins,* 855 N.E.2d 579 (Ill. Ct. App. 2006)(statute of repose does not begin to run until end of "continuous and unbroken course of negligent treatment"); *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212 (1990)(" [I]t is correct to use the 'continuing course of treatment' doctrine to determine the start date for running of the statute of repose"); *Blanchette v. Barrett,* 640 A.2d 74 (Conn. 1994); *Comstock v. Collier*, 737 P.2d 845 (Colo. 1987)(Three year statute of repose did not begin to run until termination of treatment); *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 249 (1986); *See, also, Conner v. St. Luke's Hospital, Inc.*, 996 F.2d 651 (4th Cir. 1993), *citing Stallings v. Gunter, supra,* as authoritative. It is because, of course, the statute of repose does not begin to run until the cause of action "accrues" and, under the continuous medical treatment doctrine, the cause of action does not accrued until the date of the last treatment.

In *Blanchette v. Barrett*, 229 Conn. 256, 640 A.2d 74 (1994), *overruled on narrow issue of tolling beyond last visit by Grey v. Stamford Health Sys., Inc.*, 282 Conn. 745, 924 A.2d 831 (2007), the Connecticut Supreme Court noted :

> It may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury during a course of treatment. Alternatively, the negligence may have consisted of a series of acts or omissions. ***Thus, it is appropriate to allow the course of treatment to terminate before allowing the repose section of the statute of limitations to run, rather than having the parties speculate and quarrel over the date on which***

> ***the act or omission occurred that caused the injury during a course of treatment.*** See *Comstock v. Collier,* 737 P.2d 845, 848-49 (Colo.1987) (applying continuous treatment doctrine to toll statute of limitations until course of treatment for particular condition that included one or more negligent acts or omissions causing injury terminated); 1 D. Louisell & H. Williams, Medical Malpractice (1993) ¶ 13.02.

Id. at 227-28, 85-86 (emphasis supplied). Thus, the Connecticut high court rested its decision that the statute of repose does not begin to run until the last date of treatment on the reasoning of the Arkansas high court, as cited above: that both the physician/patient relationship is benefited by allowing the relationship and treatment to continue without interruption by the need to file suit or pin point an exact date of negligence.

Applying this logic to the case at hand, the Appellant did the right thing by continuing to go to his doctor, the Appellee physician, and report to him the troubles he was having with pain and swelling at the incision site. By doing this, the Appellant was not only affording himself the opportunity to recover physically, he was unknowingly affording the Appellee physician the opportunity to discover his medical error and to correct the same. Unfortunately for both parties, the Appellee physician did not x-ray the Appellant's hand and discovery the presence of the scalpel blade. Therefore, on January 8, 1997, when the Appellant was told that further surgery was the only course of action, Appellant chose, due to his lack of either insurance or money to have such surgery, to terminate his treatment. It was on this date that the statute of repose began to run and, thus, the Appellant was compelled by statute to file his action against the Appellee physician no later than January 8, 2007. Appellant filed this action on August 3, 2006, within the statute of repose and, accordingly, his action should not have been dismissed.

B. *In the Absence of the Continuing Medical Treatment Doctrine, the Four Follow Up Visits Which, According to Appellant's Expert, Constitute Separate Breaches of the Standard of Care, Are Not Barred by the Statute of Repose and Should Not Have Been Dismissed*

A quick review of the Order entered by the Circuit Court would never lead the reader to conclude that it was entered upon a Motion to Dismiss, rather than as a result of a bench trial or even the filing of a Motion for Summary Judgment. It amazingly entitled "*Findings of Fact and Conclusions of Law,*" and, does, indeed, make findings of fact, including that "the Plaintiff has failed to demonstrate that the Defendant misrepresented material facts or otherwise acted to prevent the Plaintiff from discovering the nature of his injuries;" and "[t]he Plaintiff subsequently cancelled this surgery. Therefore, the Plaintiff cannot claim that the Defendant acted in a manner to prevent the Plaintiff from discovering the nature of his injuries." It further sets forth the standard not for determining a motion to dismiss, but, rather, a motion for summary judgment, by concluding that "***viewing in a light most favorable to the Plaintiff***, pursuant to West Virginia's statute of limitations discussed above, the absolute latest that this action could have been filed would have been on July 6, 2005, which is ten years after the date of the original surgery and alleged injury." *See Findings of Fact, Conclusions of Law and Judgment Order* at 1-2 (emphasis supplied).

Until now, one would think it would go without saying that in West Virginia, the standard by which a court must review a motion to dismiss is as follows:

> The trial court, in appraising the sufficiency of a complaint . . ., should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove ***no set of facts*** in support of his claim which would entitle him to relief

John W. Lodge Distribution Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978)(emphasis supplied).

In the instant case, the Appellant submitted to the Circuit Court the opinion of his expert that each of the follow up visits, specifically October 22, 1996, October 25, 1996, January 6, 1997, and January 8, 1997, constituted a separate and distinct breach of the standard of care because when a patient presents with a history of surgery and pain and swelling at the incision site, the physician ***must eliminate the possibility of a foreign body*** in order to perform his duties within the applicable standard of care. It is undisputed that the Appellee physician ***failed to take, order, or even suggest an x-ray be taken.***

Forget for a minute that the Appellee physician is the physician that left the blade in the hand in the first place. Even under that hypothetical, the Appellee physician would be guilty of negligence for failing, when presented on October 22 and 25, 1996 and January 6 and 8, 1997, with a history of surgery and pain and swelling at the incision site, to perform an x-ray to eliminate the possibility of a foreign body. Thus, under this hypothetical, the entire course of medical treatment would fall within the statute of repose and could not have been dismissed for that reason.

Accordingly, the Appellant most certainly ***can*** prove a set of facts which would entitle him to relief and he must be allowed to do so.

As one last note, because the Circuit Court focused on the so-called absence of evidence that the Appellee physician did not "act in a manner to prevent" the Appellant from discovering the true nature of his injuries, it should be noted that by failing to order an x-ray, which the Appellant would have to have seen and would have provided concrete evidence of the ugly truth of the presence of the blade, the Appellee physician

suggested that he open up the Appellant's hand, presumably without the Appellant watching him do so, to see what the trouble was. A jury might very well conclude that this evidence suggests that the Appellee physician "acted in a manner to prevent" the Appellant from discovering the true nature of his injuries.

As this Court has held time and again:

> '[P]ain, suffering, and manifestation of the harmful effects of medical malpractice do not, by themselves, commence running of the statute of limitation.' Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment. * * * In a great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury. (Emphasis supplied).

Gaither v. City Hospital, Inc., 199, W. Va. 706, 714-715, 487 S.E.2d 901, 909-10 (1997), quoting *Hill v. Clarke*, 161 W. Va. 258, 262, 241 S.E.2d 572, 574 (1978).

Appellant has been robbed of his right to proceed with his action for medical negligence based upon application of erroneous findings and conclusions and application of the wrong standard of law to his *Complaint*. Nothing will set this right but a reversal of the Circuit Court's dismissal and a remand to the Circuit Court setting forth clear instructions that findings of fact as to reasonableness of the Appellant to have not discovered the blade until the 2005 x-ray are to be made by a jury ***and not the court.***

VI. Conclusion

The dismissal of this action must be reversed and remanded with instructions. The Court improperly concluded that the cause of action accrued at the time of the surgery and not upon the date of the last medical treatment. Alternatively, the Court erroneously resolved factual issues and applied the wrong legal standard to the motion to dismiss and ignored the evidence presented from Appellant's expert regarding the

four separate and distinct instances of the breach of the standard of care which fell within ten years of the filing of the *Complaint.*

PAUL E. FORSHEY and **MELISSA L. FORSHEY,** Petitioners/Plaintiffs,
By Counsel

DATED: February 22, 2008

UNDERWOOD & PROCTOR

By:
Anne E. Shaffer (WVSB# 5174)
923 Third Avenue
Huntington, WV 25701
Telephone: 304-522-0508
Facsimile: 304-399-5449

CERTIFICATE OF SERVICE

I, Anne E. Shaffer, counsel for Appellant do hereby certify that the foregoing Brief of the Appellant was served upon the following by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Robert J. D'Anniballe, Jr.
Pietragallo, Bosick & Gordon, LLP
3173 Main Street
Weirton, WV 26062

DATED: February 22, 2008

UNDERWOOD & PROCTOR

By: _____
Anne E. Shaffer (WVSB# 5174)
923 Third Avenue
Huntington, WV 25701
Telephone: 304-522-0508
Facsimile: 304-399-5449